

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARQUIS RICE,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
JOHN KERESTES, et al.,	:	NO. 11-1174
Respondents.	:	

REPORT AND RECOMMENDATION

DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

March 30, 2012

Before the Court for Report and Recommendation is the *pro se* petition of Marquis Rice (“Rice” or “Petitioner”), a state prisoner, for the issuance of a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. He challenges his state court conviction of first-degree murder on the grounds that he received ineffective assistance when his counsel allegedly failed to investigate and present testimony from himself and other eyewitnesses to support his claim of self-defense and to offer evidence of his good character and peaceful nature. For the reasons set forth below, we conclude that his claims are without merit and therefore recommend that the petition be denied without an evidentiary hearing.

I. PROCEDURAL OVERVIEW

Rice was convicted on May 5, 2004 following a jury trial in the Philadelphia Court of Common Pleas of the November 20, 2000 murder of Thomas Redmond.¹ The Honorable M. Teresa

¹ According to the state court records, Rice was arrested on July 15, 2001 and arraigned in the Court of Common Pleas on October 31, 2001. His trial was delayed for some time due to plea discussions and consideration of a non-jury disposition. In addition, scheduling of the trial appears to have been affected by the fact that the Commonwealth at one time designated the matter as a
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Sarmina sentenced him on June 16, 2004 to the mandatory term of life imprisonment for the first degree murder conviction and additionally to terms of 9-60 months for possession of an instrument of crime and 9-24 months for recklessly endangering another person, both to run concurrently with the murder sentence. Represented by new counsel, Rice appealed on the ground that the trial court erred in refusing to give a requested voluntary manslaughter instruction. *See* Br. for Appellant, *Commonwealth v. Rice*, No. 1989 EDA 2004, 2004 WL 5651137 [Resp't Ex. B]. The Superior Court affirmed the conviction, *Commonwealth v. Rice*, No. 1989 EDA 2004 (Pa. Super. Ct. Feb. 2, 2006) [Resp't Ex. C], and on July 27, 2006 the Pennsylvania Supreme Court denied allocatur. *Commonwealth v. Rice*, 903 A.2d 537 (Pa. 2006).

Rice filed a *pro se* petition for collateral relief under Pennsylvania's Post Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541-46 (the "PCRA") on December 11, 2006. (St. Ct. Rec. D19.) Counsel was appointed and filed an amended petition raising three claims of ineffective assistance of trial counsel that mirror the issues Rice presents to this Court.² (St. Ct. Rec. D21.) The PCRA Court determined that all of the claims raised lacked arguable merit and accordingly dismissed the amended petition without a hearing on November 21, 2007 pursuant to Pa. R. Crim. Proc. 907. (*See* St. Ct. Rec. D31.) The Superior Court affirmed the dismissal, *Commonwealth v. Rice*, No. 3197 EDA 2007 (Pa. Super. Ct. Feb. 25, 2010) [Resp't Ex. G], and the Pennsylvania Supreme Court denied allocatur on September 29, 2010. *Commonwealth v. Rice*, 8 A.3d 344 (Pa. 2010).

¹(...continued)
capital case requiring special calendaring.

² Rice also initially sought to present these claims on direct appeal with new counsel. Given that the Pennsylvania Supreme Court's preferred practice at that time was to defer claims of ineffectiveness of counsel that might require development of a record until PCRA review, Rice did not pursue those claims in his brief to the Superior Court on direct appeal.

Rice initiated the present action on February 8, 2011, filing both a form petition (“Pet.”) and a memorandum of law (“Pet’r Br.”). (Doc. No. 1.) Respondent District Attorney of Philadelphia filed a response (“Resp.”) with appended exhibits (“Resp’t Ex.”) on September 13, 2011. (Doc. No. 13.) Although Petitioner was given a period of thirty days in which to file a reply to the response, he did not do so. The matter is now ripe for review.

II. FACTUAL BACKGROUND

The state court opinions on direct appeal provide the following relevant background to our discussion:

On November 20, 2000, Thomas Redmond [the deceased] and his brother Jermaine Redmond were walking home. At around 1:00 p.m., the two approached 55th and Malcolm Street. The two brothers became involved in a fight with “Marlon” and defendant, which began with mere words, but escalated into a physical altercation. There were approximately six to seven other people who were out there at the time of the fight. At one point during the fight, Thomas Redmond argued with “Marlon,” striking him. The defendant, a friend of Marlon’s, tried to break up the fight. Thomas Redmond then hit defendant and they began fighting. The fight ultimately concluded, and Thomas and Jermaine Redmond went home.

Shortly after they arrived home, Thomas Redmond realized that he had left his sweatshirt at 55th and Malcolm Street. While Thomas Redmond was walking back to retrieve his sweatshirt, he saw his friend, Brian McFadden, driving down the street. Mr. McFadden stopped, at which point Thomas Redmond asked Mr. McFadden to drive him to get his sweatshirt. As the Redmonds’ home was only two blocks from 55th and Malcolm Streets, Jermaine Redmond followed the car on foot to be sure that his brother was alright. When the car reached the corner and as Thomas Redmond was getting out of the front passenger seat, defendant came out of a store, took a few steps toward the car and began shooting at Thomas Redmond. Defendant was about twelve feet from the car, when he fired five or six shots at Thomas Redmond. Mr. McFadden pulled Thomas Redmond back into the car and drove him directly to Misericordia

Hospital, picking up Jermaine Redmond on the way. Thomas Redmond was pronounced dead at 7:30 p.m.

When questioned by Southwest Detectives, Jermaine Redmond identified the defendant from a photographic array, as the shooter. Thereafter, [a detective] obtained an arrest and search warrant for the defendant; however, defendant was not arrested until July 15, 2001 [nearly eight months later].

Commonwealth v. Rice, No. 1989 EDA 2004, slip opin. at 1-3 (Pa. Super. Ct. Feb. 2, 2006) [Resp't Ex. D] (quoting Tr. Ct. Opin., 8/24/04, at 2-3 (omitting record citations) (footnote omitted)). Rice was represented at trial by Andres Jalon, Esquire.³

Defendant's theory of the case at trial was misidentification, with the crux of his defense that the shooter could have been Petitioner's identical twin, Marcus Rice. *See* Tr. Ct. Opin., 8/24/04 at 6-7 [Resp't Ex. A]. The defense did not call any witnesses. Testifying at trial, Jermaine Redmond identified Petitioner as the shooter, explained that he had known "the twins" for about four years before the fight and had never mistaken one for the other, and confirmed that Marcus had not been involved in the fight. *See* Tr. Ct. Opin., 8/24/04 at 2, n.5 (citing N.T. 5/4/04 at 90, 107-08).

III. DISCUSSION

Rice requests habeas relief based upon what he sets out in his petition as four grounds implicating his right to the assistance of effective counsel: (1) the failure of counsel to have conducted an adequate pre-trial investigation of a claim of self-defense; (2) the failure of counsel to have located and interviewed witnesses to the shooting; (3) the failure of counsel to call character witnesses at trial and to have informed Petitioner of his right to call such witnesses; and (4) counsel's recommendation to Petitioner that he not exercise his right to testify on his own behalf, based upon

³ Rice retained Gerald A. Stein, Esquire on or around May 2, 2002 to represent him as to these charges. Attorney Jalon appears to have been Stein's colleague.

what Petitioner characterizes as an inaccurate and unreasonable rationale. (Pet. at 8-14.)

We first set out the standards by which we must assess a petition containing claims, as here, that have been adjudicated on the merits in the state court. We also describe how we must evaluate claims of ineffective assistance of counsel. We then address the claims in the order in which Rice presents them in his petition.⁴

A. Standards for the issuance of a writ of habeas corpus

In cases where the claims presented in a federal habeas petition were adjudicated on the merits in the state courts, the federal court may not grant habeas relief unless the state court adjudication —

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d).

The Supreme Court has made it clear that a habeas writ may issue under the “contrary to” clause of Section 2254(d)(1) only if the “state court applies a rule different from the governing rule set forth in [United States Supreme Court] cases or if [the state court] decides a case differently than [the United States Supreme Court has] done on a set of materially indistinguishable facts.” *Bell v. Cone*, 535 U.S. 685, 694 (2002). A writ may issue under the “unreasonable application” clause only where there has been a correct identification of a legal principle from the Supreme Court but the state court “unreasonably applies it to the facts of the particular case.” *Id.* This requires the petitioner to

⁴ Rice presented them in a different order in his accompanying brief.

demonstrate that the state court's analysis was "objectively unreasonable." *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002). In addition, this standard obligates the federal courts to presume that the "state courts know and follow the law" and precludes the federal court from determining the result of the case without according all proper deference to the state court's prior determinations. *Id.* at 24.

B. Standards for claims of ineffective assistance of counsel

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-prong test to evaluate claims of ineffective assistance of counsel in violation of the Sixth Amendment. Under *Strickland*, counsel is presumed to have acted reasonably and effectively unless the petitioner can demonstrate both that "counsel's representation fell below an objective standard of reasonableness" and that there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 686-88, 693-94.

When a Pennsylvania appellate court has addressed an ineffectiveness claim on the merits, our analysis must also be guided by the deferential standard of review provided for in § 2254(d). As the *Strickland* standard itself is a "general standard," and the Supreme Court recognizes that a state court "has even more latitude to reasonably determine that a defendant has not satisfied that standard," our review of a state court decision on the merits of an ineffectiveness claim is "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). In these circumstances, we "take a highly deferential look at counsel's performance, *Strickland, supra*, at 689, through the deferential lens of § 2254(d), *Mirzayance, supra*, at n.2." *Cullen v. Pinholster*, --- U.S. ---, 131 S.Ct. 1388, 1403 (2011).

C. Analysis of claims presented

1. Grounds One and Two: Ineffective assistance of counsel claims concerning counsel's alleged failure to investigate and present available evidence that Petitioner acted in self-defense⁵

The first two grounds upon which Rice seeks relief concern the alleged ineffective assistance of his trial counsel for presenting a misidentification defense at trial without having investigated the strength of a self-defense theory. Rice claims that the self-defense theory would have been supported by his own testimony and that of other eyewitnesses and would have been more effective than the misidentification theory that Attorney Jalon embraced but, in Rice's view, seemed to abandon during the course of the trial.⁶ He suggests that the strategic choice of counsel is subject to attack because

⁵ We address these grounds together as they are interconnected and were presented to the state court as a single claim.

⁶ The court held a charging conference before the second (and final) day of trial, at which time Attorney Jalon requested instructions on voluntary manslaughter, justification, use of deadly force, and self-defense. When the court asked Jalon to explain why a self-defense instruction was warranted, he answered:

MR. JALON: This is actually a case, Judge, where I think, and I've actually never seen this, not that I have extensive experience, but I've never seen a case that's really divided on two issues, which I would say is self-defense and ID.

The testimony of all the witnesses or at least the key witness here, who's the brother of the deceased, is that they have an encounter prior to the shooting that resulted in a fist fight where my client was attacked by him and his brother, my client being the one that was trying to prevent or at least break up the fight to some extent.

Then we have the brother who testifies that they leave that scene and within 15 minutes, it's almost like a pincher maneuver, the decedent gets into a vehicle, they go down the street to come back to the area but they do it in a manner in which it's obvious that two of these individuals that are in a vehicle are going to come up 55th Street in an attempt to find either my client or the other individual that they were fighting with earlier, and then two individuals are heading directly down Malcolm Street with the intent to do the same thing.

(N.T. 5/5/04 at 4-5.) The court noted that "there has to be evidence in the case that supports a self-
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it was not based upon a reasonable pre-trial investigation. Rice further alleges that he was prejudiced by the strategic choices that Jalon made and the inconsistencies in the defense strategy because there is a reasonable probability that the jury inferred that he had no good defense and therefore was guilty. He also contends that there was viable evidence available to counsel that would have supported a self-defense theory, including evidence of the victim's propensity towards violence, such that the jury could have credited his account and found him guilty only of voluntary manslaughter and not first-degree murder. (Pet'r Br. at 15-16.)

Rice presented this claim on PCRA review and requested an evidentiary hearing. The PCRA

⁶(...continued)

defense theory," either from the defendant himself or other sources. (*Id.* at 16.)

We do not agree with Petitioner that Jalon jettisoned his misidentification defense. In questioning of subsequent fact witnesses, Attorney Jalon continued to explore how indistinguishable his client was from his twin brother — particularly from the distance at which Jermaine Redmond testified that he witnessed defendant shoot the victim, Thomas Redmond — and the tendency of the twins to frequent the neighborhood together. (*Id.* at 33-40.) He also persistently cross-examined a witness called by the Commonwealth who provided an alibi for twin brother Marcus. (*Id.* at 40-67.) We see no evidence that Jalon "abandoned" the misidentification theory mid-way through trial, even as he intimated a self-defense theory to the jury. *See id.* at 132 (conceding in closing argument that "there's no evidence" that the deceased had a gun but that there were "a lot of attending circumstances and factors" that had to be considered which suggested just that); *id.* at 120 (referring to Thomas and Jermaine Redmond's history of "criminal episodes"); *id.* at 122-26 (suggesting forgotten sweatshirt was fabricated reason for victim to return to scene, as no such article of clothing was found on the scene and victim drove past scene of fight before stopping car); *id.* at 126-28 (observing that Jermaine Redmond, who had also been involved in fight and was approaching on foot, was not shot, suggesting that he did not present a threat to the shooter); *id.* at 132 (noting that evidence of a shot fired first by victim Thomas Redmond would have been found in McFadden's car, which was not recovered by the police for 5 hours); *id.* at 133-36 (noting that Jermaine Redmond and McFadden did not stay with Thomas at the hospital but instead left with car, and suggesting that they did so to remove evidence that Thomas was the aggressor prompting shooting); *id.* at 131 (contending that shooter would not have pulled a gun out while "just walking down the street" unless he "believe[d] that someone is going to try to kill [him]"). *See also id.* at 129-30 (describing shooter as "Marquis or Marcus"); *id.* at 142-45 (arguing that Marquis and Marcus could not be differentiated from the distance at which Jermaine Redmond allegedly witnessed the shooting, even by someone who knew them well).

Court concluded that he had not sufficiently demonstrated the willingness of putative self-defense witnesses to testify at his trial as to warrant an evidentiary hearing. The court also determined that “counsel’s decision to pursue a defense of misidentification and not self-defense was reasonable and based on trial strategy,” as a claim of self-defense would have contradicted Rice’s statement to the police upon his arrest that they were confusing him with his brother. *Commonwealth v. Rice*, CP-51-CR-1006371-2001, slip opin. at 3 (Phila. Ct. Comm. Pl. Mar. 7, 2008) [Resp’t Ex. E]. The court noted that Rice presented an unsworn interview record of one Kemonte Tillery, who he claims would have supported his claim of self-defense, but that Tillery refused to provide a signed statement or affidavit and thus was presumed to have been unwilling to cooperate and appear on behalf of Rice. The court also noted that another purported fact witness, George Gorrell, who provided a notarized statement submitted with the PCRA petition, confirmed that Petitioner was present at the time a gun was fired and killed the victim but could not attribute any act of aggression towards Petitioner by the victim apart from a “sucker punch” he landed on Petitioner in the earlier fistfight. The court concluded that this testimony would have run contrary to the misidentification defense that counsel reasonably pursued at trial and that Petitioner’s claim thus lacked arguable merit. *Id.* at 4. The Superior Court agreed that Rice’s contentions that trial counsel was ineffective for failing to present witnesses on his behalf were also “patently meritless” because Rice affirmed, in a legally adequate colloquy conducted by the trial court, that he did not want to present any witnesses. The court concluded that he could not now claim that trial counsel was ineffective for failing to call witnesses. *Commonwealth v. Rice*, No. 3197 EDA 2007, slip opin. at 4 (citing *Commonwealth v. Larson*, 762 A.2d 753, 756 (Pa. Super. Ct. 2000)) [Resp’t Ex. G].

Rice contends in his papers that he provided counsel with an account of the events of the

shooting and his belief that he was acting in self defense, as well as the names and “locations” of five “material witnesses.” (Pet’r Br. at 10.) He asserts that Attorney Jalon investigated this evidence inadequately by merely “travel[ing] to the home of only one witness, George Mills,” just one time and just a few days before the start of trial, and making no further effort to locate this witness. (Pet’r Br. at 11.) He contends that counsel advised him “that he had no intention[of] calling witnesses with criminal backgrounds.” (*Id.*) He also assails “counsel’s decision to mount a misidentification defense” that was hampered by various weaknesses and in light of “overwhelming credible evidence that he was the shooter.” (*Id.* at 12.) He also suggests that counsel should not have sought to reconcile his strategy with his statement to police at the time of arrest that the person the police wanted was really his brother, as “he, like many suspects,” simply “tried to evade arrest.” (*Id.*) He provides no specific argument as to the unreasonableness of the state court’s rejection of this claim under 28 U.S.C. § 2254(d).

The record before us belies Rice’s contentions that counsel performed deficiently. Following the close of the Commonwealth’s case, the trial court engaged in a colloquy with Rice in which he had an opportunity to raise (and thus memorialize) any concerns about the defense theory that had been presented or about witnesses who would have supported the alternative theory of self-defense, including himself. After explaining to Rice his absolute right to make the decision whether he would testify and her understanding that he did not wish to testify, Judge Sarmina probed:

THE COURT: Now, sir, were there any witnesses that you wanted to call or anything that you had discussed with Mr. Jalon that had not happened?

THE DEFENDANT: No.

(N.T. 5/5/04 at 106.) After confirming with Rice that his decision not to testify was made

voluntarily and freely, she continued the colloquy:

THE COURT: And I do want to clarify for you, Mr. Rice, that as I see the case right now [at the close of the Commonwealth's case], I do not see that there's any evidence in the case that would justify a self-defense instruction.

Self-defense is an affirmative defense. It doesn't have to be that you put it in the case directly if there is evidence from another source, but as I see the case right now, based on the facts that have been testified to here, there is nothing here that would support a self-defense instruction.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: So by not testifying and affirmatively asserting that, which you don't have to do, but if you want the instruction, that's the only way that I am looking at the case right now that would justify a self-defense instruction, do you understand all of that?

THE DEFENDANT: Yes.

THE COURT: So if you're not testifying, I will not be giving the self-defense instruction.

(N.T. 5/5/04 at 107-08.) Judge Sarmina confirmed that Rice understood this and confirmed with defense counsel that he was prepared to rest immediately after the Commonwealth rested. (*Id.* at 108-11.)

This record demonstrates that Petitioner had the opportunity to advise the trial court that he had provided his attorney with information on several potential witnesses and that there was available testimony (from himself and others) that he shot the victim in self-defense. He did not avail himself of that opportunity. Moreover, *counsel* developed a record that he *did*, in fact, see the value of a self-defense theory, as he actively (albeit unsuccessfully) sought an instruction from the court and prepared Rice to testify. *See id.* at 109 (colloquy of Rice by Jalon confirming that they

reviewed the proposed jury instructions for self-defense and manslaughter, that he prepared Rice to testify that day, and that Rice decided not to testify even after he was prepared); *id.* at 112 (objection by Jalon to court’s refusal to give self-defense instruction). Jalon also argued self-defense in his closing, based upon attending circumstances if not direct evidence.

In light of the record memorializing *Petitioner’s* decisions as to the defense presented to the jury, there is no basis for any finding of deficient performance regarding case strategy as Petitioner alleges. Moreover, we cannot accept the notion that there was a reasonable probability that Rice would have been found guilty of a lesser degree of homicide than first-degree murder had his self-defense “evidence” been presented. There was much for the Commonwealth to assail in the proposition that Rice believed he had acted in self-defense: Rice evaded arrest for eight months and then, upon his arrest, gave an alias and stated “you don’t want me, you want my brother” — all of which demonstrated consciousness of guilt and not a reasonable belief that he had to shoot the victim to protect himself. In addition, as noted by the state court, the written statements of his witnesses obtained in relation to his PCRA litigation are lacking in a critical area: the witnesses did not see the victim walking towards Petitioner with a silver gun pointed at him and thus potentially warranting Rice’s use of deadly force, as Rice claimed post-conviction. *See, e.g.,* PCRA Pet., Mem. at 11.⁷

Rice has failed to meet his burden under 28 U.S.C. § 2254(d) to demonstrate that the state court unreasonably applied the *Strickland* standard when it rejected this claim of ineffective assistance of counsel for failure to investigate and present a self-defense case rather than argue that

⁷ George Gorrell gave a statement to PCRA counsel’s investigator on August 1, 2007 explaining that he heard shots and then saw a gun drop from the area of victim Thomas Redmond but that he did not see either Redmond or Rice holding a gun. *See* Br. for Appellant, *Commonwealth v. Rice*, Pa. Super. Ct. No. 3197 EDA 2007 (Mar. 24, 2009) at App. B., Ex. A.

the Commonwealth witnesses misidentified Petitioner as the gunman. We further find that an evidentiary hearing is not warranted at this stage in light of Rice's sworn statements at trial that he had no other witnesses to present and understood the consequence of the failure to call witnesses on any self-defense theory that counsel wished to argue as well as the weak evidentiary proffer supporting a case for self-defense. The claims asserted at Grounds One and Two of his petition accordingly do not provide a basis for habeas relief.

2. Ground Three: Ineffective assistance of counsel claim for failure to call character witnesses and provide Petitioner with relevant information concerning the role of character witnesses

In the third ground for relief set out in his petition, Rice alleges that trial counsel "failed to inform [him] of his fundamental right to call character witnesses and to provide him with relevant information that would have enabled him to make a meaningful decision" — presumably referring to his decision to allow the defense to rest without any witnesses having been called. (Pet. at 12.)

Rice presented this claim to the state court on PCRA review. In its Notice of Intent to Dismiss his petition without a hearing, the PCRA Court explained that "counsel's decision in not calling character witnesses was a reasonable one based on Petitioner's prior drug convictions," which could have been used to impeach the witnesses' knowledge of Rice's character and reputation and allowed evidence of Rice's prior bad acts to come before the jury. The court also cited to its colloquy of Rice and his confirmation that there were no other witnesses that he wished to call or anything else he wanted to raise. *Commonwealth v. Rice*, CP-51-CR-1006371-2001, slip opin. at 4 (Phila. Ct. Comm. Pl. Oct. 26, 2007) [Resp't Ex. D]. On appeal, the Superior Court rejected this claim when it found his contention concerning counsel's failure to present witnesses on his behalf to be "patently meritless" in light of his "legally adequate colloquy" in which "Rice indicated that

he did not want to present any witnesses[.]” *Commonwealth v. Rice*, No. 3197 EDA 2007, slip opin. at 4 (Pa. Super. Ct. Feb. 25, 2010) [Resp’t Ex. G].⁸

Again, the record before us belies Petitioner’s contention that he was prejudiced by deficient performance by counsel in this regard. Rice contends in his papers before us that his trial counsel “never once discussed with him the importance of presenting good character evidence on his behalf at trial” and thus breached his “duty to inform Rice of his fundamental right to call character witnesses and to provide him with relevant information that would have enabled him to make a meaningful decision.” (Pet’r Br. at 25, 27.) While Rice’s *pro se* submissions to the state court and to this Court are silent on the question of whether the subject of character witnesses had ever arisen as counsel and Rice prepared for trial, Rice’s counseled PCRA petition averred that “there were many people that defense counsel could have called upon” to testify to Rice’s peaceful character and that “*Petitioner made trial counsel aware of all of these witnesses.*” Am. Pet. for Relief under the

⁸ In the “Statement of the Questions Involved” portion of his *pro se* appellate brief to the Superior Court, Rice presented the issue as whether the PCRA Court had abused its discretion in not holding an evidentiary hearing on his ineffectiveness claims where trial counsel “(a) failed to call Appellant as a witness even after Appellant advised him of his desire to testify; [and] (b) fail[ed] to call or even consider calling numerous available good character witnesses on his behalf at trial.” Br. for Appellant, *Commonwealth v. Rice*, Pa. Super. Ct. No. 3197 EDA 2007, at 4 (Mar. 21, 2009) [Resp’t Ex. F]. Thus, this section of his brief did not highlight the issue of Jalon’s *counseling* of him concerning character witnesses. One of the subsections of the argument portion of his brief, however, clearly implicated counsel’s alleged failure “*to advise appellant of the importance of character testimony*” and “to call or even consider calling numerous available good character witnesses on his behalf at trial.” *Id.* at 25 (Section III heading) (emphasis added).

In a concurring and dissenting opinion, Judge Colville noted that “part of Appellant’s PCRA claim is that his trial counsel *did not advise him concerning* character witnesses.” *Commonwealth v. Rice*, No. 3197 EDA 2007 (Pa. Super. Ct. Feb. 25, 2010) (Colville, J., concurring and dissenting) (emphasis added) [Resp’t Ex. G]. He believed an evidentiary hearing was warranted to develop the record further on this point, as “it appears Appellant may have answered differently during the colloquy had he been advised or advised differently by his counsel regarding character witnesses.” *Id.*

PCRA, *Commonwealth v. Rice*, Mem. at 6 (Apr. 25, 2007) (emphasis added). Moreover, while the trial court during its colloquy did not specifically question Rice concerning whether he wished to present character witnesses, neither did Judge Sarmina restrict her questions to eyewitnesses or fact witnesses. Instead, when she asked Rice if there were *any witnesses* he wished to call on his behalf, he answered, unequivocally, “no.” (N.T. 5/5/04 at 106.)

While we appreciate that Rice was not given leave to develop the record further as to this claim on PCRA review, we do not find the state court to have unreasonably applied *Strickland* in rejecting it on the pleadings. *Strickland* requires courts on collateral review to presume the effectiveness of counsel. On PCRA review, the state court found legitimate reasons why Attorney Jalon would have counseled against calling witnesses to testify to Rice’s peaceful character based upon the anticipated rebuttal permitted by the state rules of evidence — specifically, evidence of Rice’s past drug-dealing. Both the risks of opening the door to this rebuttal evidence and the questionable additional benefit of the proffered character evidence undermines the notion that Rice was prejudiced by Jalon’s alleged deficiency.⁹ Had the proffered character witnesses been called to

⁹ The affidavits that Rice presented to the state court on PCRA review, obtained in September 2006, were identical typed statements asserting that in November 2000 Rice “had an excellent reputation in the community for being a peaceful and non-violent person” and that the witness would have appeared and testified on his behalf at trial in May 2004. The affiants were: (1) his grandmother, who added on her affidavit that Rice “was friendly, courteous and kind” and “always made friends easily” and that he had completed high school and was about to start a job when he was arrested in 2001; (2) his aunt, who added that, “to me he [sic] respectful and a peaceful Guy”; (3) someone by the name of Nathaniel Greennagh, who did not provide further information about his relationship with Rice apart from stating that he “ha[s] known him for approximately 4 years”; (4) someone by the name of Ruth Johnson, who did not identify any relationship with Rice but had known him “since infancy” and reported that “he was a good child and a polite child” and “was also courteous and kind”; and (5) someone by the name of Marlesa Croxten, who had known him for approximately 27 years and additionally reported that “he’s a very respectful person” and that he had “never been in any trouble since I can remember,” asking, “can you please give him
(continued...)

testify at trial in 2004, their knowledge of Rice’s reputation in the community — of questionable value coming from the two family members — would have been subject to impeachment by the Commonwealth as to their knowledge of his three prior convictions in the Court of Common Pleas for possession with intent to deliver drugs.¹⁰ *See Commonwealth v. Jones*, 636 A.2d 1184, 1189-90 (Pa. Super. Ct. 1994) (observing that “counsel may well have concluded that potential cross-examination of appellant’s character witnesses regarding the drug activity in which appellant was engaged offered dangers which outweighed the doubtful value of their testimony regarding appellant’s alleged reputation for non-violence”).¹¹

Considering both the colloquy on the record before the defense rested and *Strickland*’s presumption that counsel operates pursuant to sound trial strategy, the state court reasonably concluded that Attorney Jalon’s failure to call character witnesses did not reflect an error “so serious that counsel was not functioning as ‘counsel’ guaranteed ... by the Sixth Amendment.” *Strickland*, 466 U.S. at 689. In addition, in light of the questionable value of the proffered character evidence and the available impeachment material, we do not believe there would have been a reasonable

⁹(...continued)
another chance.” PCRA Pet. filed 12/11/06, at Ex. A [St. Ct. Rec. D19].

Born in December 1979, Rice was 20 years old at the time of the shooting in November 2000 and 26 years old when the affidavits were notarized in September 2006.

¹⁰ The response to Rice’s petition referred to his prior drug convictions. Rice did not refute the characterization of his conviction history, and our review of publicly-available state court docket sheets confirms Respondents’ characterization. *See* <http://ujportal.pacourts.us/DocketSheets/CP.aspx> (search under Petitioner’s name showing arrests for PWID on 9/8/99, 2/9/200, and 10/9/00, all resulting in convictions).

¹¹ We find Petitioner’s authority, *Peterkin v. Horn*, 176 F. Supp.2d 342, 379 (E.D. Pa. 2001), to be inapposite, as that case dealt with a decision relating to the penalty phase of a capital case and the failure of counsel to present evidence supporting mitigating circumstances.

probability of an acquittal on the first-degree murder charge had the jury heard this evidence. The state court's rejection of this claim thus does not amount to an unreasonable application of *Strickland*. Accordingly, pursuant to 28 U.S.C. § 2254(d), habeas relief is not warranted on this Sixth Amendment claim.

3. Ground Four: Ineffective assistance of counsel claim for advising Petitioner not to testify at trial

The final ground for relief that Rice sets out in his petition alleges that trial counsel “provided ineffective assistance by advising petitioner not to testify on his own behalf.” (Pet. at 13.) He contends that despite his request to testify, “[c]ounsel advised [him] not to take the stand and to waive his right when colloquied.” (*Id.* at 13-14.) Rice further claims that because “[t]he rationale given to petitioner by counsel against testifying turned out to be inaccurate and so unreasonable,” it “vitiate[d] petitioner’s knowing and intelligent decision not to testify.” (*Id.* at 14.)

Rice presented this claim to the state court on PCRA review. In its Notice of Intent to Dismiss his petition without a hearing, the PCRA Court explained that the trial court had “conducted an extensive colloquy with the Petitioner where his decision to not testify was discussed” and that “Petitioner understood that he had an absolute right to testify.” *Commonwealth v. Rice*, CP-51-CR-1006371-2001, slip opin. at 4 (Phila. Ct. Comm. Pl. Oct. 26, 2007) (citing N.T. 5/5/04 at 105) [Resp’t Ex. D]. The court then noted that Rice “affirmed that his decision to not testify was made freely and voluntarily” and that he therefore could “not now claim ineffective assistance for failing to testify.” (*Id.*) The Superior Court agreed that this claim was “patently meritless” in light of the colloquy. *Commonwealth v. Rice*, No. 3197 EDA 2007, slip opin. at 4 (Pa. Super. Ct. Feb. 25, 2010) [Resp’t Ex. G].

Again, the record belies Petitioner’s contention that he was prejudiced due to deficient performance by counsel in this regard. Rice contends in his papers before us that Jalon advised him not to testify — although he wanted to provide testimony justifying his actions as self-defense — based upon his past criminal record which Rice suggests was largely *inadmissible* at trial. (Pet’r Br. at 22.) Setting aside the question of Petitioner’s opinion as to the correctness of counsel’s advice or the persuasiveness of his chosen strategy,¹² it is undisputed that Rice was given notice by both the trial court and counsel — on the record — of his right to testify and that he affirmatively disclaimed any interest in exercising that right. We find nothing unreasonable in the state court’s determination that such a solemn declaration in open court can not be set aside freely as Petitioner suggests.

In light of the colloquy on the record before the defense rested and *Strickland*’s presumption that counsel operates pursuant to sound trial strategy, the state court reasonably concluded that Rice’s failure to testify was not the product of constitutionally deficient advice from counsel. Petitioner has not met his burden under 28 U.S.C. § 2254(d) to show that the state court’s rejection of this claim amounted to an unreasonable application of *Strickland*. Accordingly, he is not entitled to habeas relief based upon Ground Four of his petition.

¹² While Petitioner argues that evidence of his drug convictions would not have been admissible as *crimen falsi* impeachment evidence against him, he acknowledges that evidence of a 1999 conviction for receiving stolen property would have been admissible. (Pet’r Br. at 23.) He suggests, however, that “at least one juror” would have related to his circumstances and agreed that this conviction resulted from “a minor mishap.” (*Id.*)

IV. CONCLUSION

As we have set out above, the Pennsylvania Superior Court did not deny relief pursuant to an unreasonable application of any United States Supreme Court authority when it adjudicated on PCRA review in 2010 the various ineffectiveness claims that Rice raises in this petition. We do not find that an evidentiary hearing before this Court would enable him to cure the defects identified as to the various claims addressed above, particularly given the weight of the evidentiary record contained in his colloquy before the trial court. Accordingly, we believe that both Petitioner's request for an evidentiary hearing and his petition for habeas relief should be denied.

Pursuant to Local Appellate Rule 22.2 of the United States Court of Appeals for the Third Circuit, at the time a final order denying a habeas petition is issued, the district judge is required to make a determination as to whether a certificate of appealability ("COA") should issue. Under 28 U.S.C. § 2253(c), a habeas court may not issue a COA unless "the applicant has made a substantial showing of the denial of a constitutional right." *See also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Here, for the reasons set forth above, we do not believe a reasonable jurist would find the Court to have erred in denying the present petition. Accordingly, we do not believe a COA should issue. Our Recommendation follows.

RECOMMENDATION

AND NOW, this 30th day of March, 2012, it is respectfully **RECOMMENDED** that the petition for a writ of habeas corpus be **DENIED** without an evidentiary hearing. It is **FURTHER RECOMMENDED** that a certificate of appealability should **NOT ISSUE**, as we do not believe that Petitioner has made a substantial showing of the denial of a constitutional right.

Petitioner may file objections to this Report and Recommendation. *See* Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ David R. Strawbridge
DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARQUIS RICE,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
JOHN KERESTES, et al.,	:	NO. 11-1174
Respondents.	:	

ORDER

AND NOW, this day of , 2012, upon careful and independent consideration of the petition for writ of habeas corpus and the parties' briefs, and after review of the Report and Recommendation of United States Magistrate Judge David R. Strawbridge, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED;
2. The petition for a writ of habeas corpus is DENIED without and evidentiary hearing; and
3. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

STEWART DALZELL, J.